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No. 91-1597

In The

Supreme Court of the United States

October Term, 1991

COMMONWEALTH OF PENNSYLVANIA

Petitioner,

v.

KARL S. CHAMBERS

Respondent.

Petition for a Writ of Certiorari to the Pennsylvania Supreme Court

BRIEF OF AMICUS CURIAE OF THE INSTITUTE IN BASIC LIFE PRINCIPLES

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MOTION TO FILE BRIEF

Come now the *Amicus Curiae*, by its attorney, and move this Court for permission to file an *Amicus Curiae* brief in support of Petitioner in this case. The attorneys for the Petitioner have agreed to allow the *Amicus* to file a brief, but the attorney for the Respondent has refused to give permission. This motion is based on Supreme Court Rule 37.4.

STATEMENT OF INTEREST

The Institute in Basic Life Principles is a not-for-profit organization which is dedicated to the goal of strengthening and preserving the vision which the founders of our country had for America. The Institute was founded on the principle that strong families, which are built on the universal non-optional principles of life found in the Bible, form the basis of a strong nation. Over 2 million individuals have attended seminars which are sponsored by the Institute and have the primary purpose of strengthening families through teaching these principles.

The Institute firmly believes that the truths which our Founding Fathers held to be "self-evident" are not merely ancient philosophies good only for bygone generations but irrelevant to contemporary society. Rather, those truths, which are either directly or indirectly derived from the Bible, are relevant to the challenges facing America today. Our nation will be strong and enjoy continued success only through returning to those foundational principles.

The Institute is particularly concerned that the Pennsylvania Supreme Court, in choosing to exclude all references to the Bible in the courtroom discussions, has contributed to the decline of morality. Through creating this per se ban, the Pennsylvania Supreme Court is isolating all courts in that state from moral law.

SUMMARY OF REASONS FOR GRANTING THE PETITION

In deciding to exclude the Bible from courtroom discussion, the Pennsylvania Supreme Court has made the following mandate:

> We now admonish all prosecutors that reliance in any way on the Bible or any other religious writing in favor of the imposition of the death penalty is reversible error per se and may subject violators to disciplinary action.[1]

Such an extreme rule attacks the very foundation of our nation's legal system and hinders the vision which the Founding Fathers had for America. Left unreversed, this decision will lead to many more decisions across the nation which are even more outrageous. This Court should take this case for the purpose of stopping this trend to remove the Bible from the courtroom and American public life and to clearly reaffirm the important role of the Bible in our nation's legal system.

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1 *Commonwealth of Pennsylvania v. Chambers*, 599 A.2d 630, 644 (Pa. 1991).

The Pennsylvania Supreme Court has also stated that

> if a penalty of death is meted out by a jury, it must be because the jury was satisfied that the substantive law of the Commonwealth requires its imposition, not because of some other source of law.[2]

By isolating juries from consideration of morality, the Pennsylvania Supreme Court has undermined the authority and good name of this Court which has repeatedly based its decisions on moral law. Such a blatant error cannot be tolerated and must be reversed.

ARGUMENT

I.

This Court Should Accept this Case for Review for the Purpose of Clarifying the Proper Role of a Jury in Capital Sentencing.

One of the most important guarantees found in the Constitution is the right to a trial by an impartial jury. When the jury is faced with a question of whether or not to invoke the death penalty, the importance of that constitutional guarantee is significantly increased.[3] Therefore, when a court speaks to the considerations of a jury in a capital sentencing case, it deals not with a trivial issue of law, but an area of great weight and importance.

Thus, the Pennsylvania Supreme Court's statement must be scrutinized under the strictest terms.

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2 *Id.* at 644.

3 *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("... The penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.")

> Our Legislature has enacted a Death Penalty Statute which carefully categorizes all the factors that a jury must consider in determining whether the death penalty is an appropriate punishment and, if a penalty of death is meted out by a jury, it must be because the jury was *satisfied that the substantive law of the Commonwealth requires its imposition, not because of some other source of law.*[4]

This is an inadequate description of the Pennsylvania law. The Death Penalty Statute does not command juries to impose the death penalty or prohibit them from doing so. That law merely allows juries to decide on death if some factors are met. Even if these aggravating factors are in the case, the jury is not required to sentence the defendant to death. Because this characterization does not follow the Constitution or the rulings of this Court, or properly interpret the Pennsylvania Death Penalty Statute, it cannot be tolerated. If not reversed, it will create new precedent for a severely limited role and duty of juries, thus hampering the fundamental right to trial by an impartial jury.

This Court has repeatedly stated that the decision of whether or not to impose the death penalty is not simply a legal question but more importantly a decision of morality. This Court has gone so far as to characterize the duty of a capital sentencing jury as "representing the conscience of the community on the ultimate decision of life or death."[5]

Not only has this Court urged juries to look beyond the statute and to make a moral inquiry, this Court has set the example for juries by looking beyond the Constitution to discern whether the death penalty is morally acceptable. Justice Marshall has gone so far as to state that

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4 *Chambers* at 644 (emphasis added).

5 *Witherspoon v. Illinois*, 391 U.S. 510, 519-520 (1968).

> Even if capital punishment is not excessive, it nonetheless violates the 8th Amendment because it is morally unacceptable to the people of the United States at this time in their history.[6]

Justice O'Connor has found that morality is an essential component of the decision-making process in a death penalty case, stating that "the sentence imposed at the penalty state should reflect a reasoned moral response to the defendant's background, character, and crime rather than mere sympathy or emotion."[7]

It is thus clear that the Pennsylvania Supreme Court did not clearly understand what this Court has repeatedly stated regarding the proper role of a jury. By making their narrow characterization, they have reduced the jury from representatives of the "conscience of the community" to a body of laymen mechanically applying the technicalities of the law.

The narrow considerations established by the Pennsylvania Supreme Court are incompatible with the jurisprudence of this Court which outlines the broader duty of a capital sentencing jury. The decision frustrates justice and must be reversed.

II.

This Court Should Accept This Case For Review for the Purpose of Establishing The Proper Source From Which Jurors Must Make Their Moral Decisions

Although the Pennsylvania Supreme Court narrowly and erroneously characterized the duty of a jury, there is also a danger of giving the jury too much discretion by providing

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6 *Furman v. Georgia*, 408 U.S. 238, 360 (1972) (Marshall, J., concurring).

7 *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

no parameters within which they must function.[8] Too much discretion leads to arbitrarily meted sentences which follow no pattern of consistency. While a juror must base his or her decision not only on the law but also on morality, who is to say where that morality will come from?

If the decision of the Pennsylvania Supreme Court stands and is read in light of these rulings by this Court, it will mean that jurors must make a moral inquiry into the question of life or death, but that their moral inquiry must be devoid of any Biblical basis.

> If a penalty of death is meted out by a jury, it must be because the jury was satisfied that the substantive law of the Commonwealth *requires* its imposition, not because of some other source of law.[9]

Again, the Pennsylvania law never *requires* juries to impose the death penalty, but rather provides the option if certain requirements are met. This harsh and restrictive prohibition against references to the Bible by prosecutors, read in the context of overwhelming case law of this Court stating the broader responsibility of a jury to represent the conscience of the community, puts the jury in an impossible situation.

While the Pennsylvania Supreme Court does not allow jurors to consider moral law (the Bible), the United States Supreme Court compels them to be the moral conscience of the community. The only possible result of this dichotomy is that jurors are left simply to base their decisions on prejudicial feelings for or against the death penalty. It is therefore clear that if a jury is to make a moral inquiry into the question of life or death, there must be a foundation from which that morality is derived.

The prosecutor understood this fact and appropriately invoked the Bible's prohibition of murder and the

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8 Compare *Furman v. Georgia*, 408 U.S. 238, 253 (1972) and *Eddings v. Oklahoma*, 454 U.S. 104, 112 (1982).

9 *Chambers* at 644 (emphasis added).

corresponding penalty of death.[10] Such a reference to the Bible made by the prosecutor in the case before this Court was most appropriate in light of the high esteem that the Bible has rightfully received throughout our nation's history.

The Founding Fathers

As this Court has noted, historical patterns alone are not to be the sole basis of contemporary adjudication, but "an unbroken practice . . . is not something to be lightly cast aside."[11] As in *Marsh*, the historical patterns overwhelmingly prove that the Bible is the source of not only our nation's laws, but also its moral law. Thus, it is imperative that the Court note the "pattern of history" that is apparent with this nation and its relation to the Bible.

The Bible has had a significant place in our nation's history, not only in the private life but in the courtrooms and legislatures as well. As the Petition for a Writ of Certiorari has persuasively argued, prayer and the Bible were influential in early courtroom procedures.[12]

An exhaustive ten-year study of about 15,000 political documents of the Founders' Era has been conducted by Dr. Donald Lutz, professor of political science at the University of Houston. This study,[13] which was published in the *American Political Science Review*, found that of the 3,154 citations analyzed, over one-third were from the Bible—more than any other source. Another 60% of all references can be

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10 The Prosecutor stated, "Karl Chambers has taken a life. As the Bible says 'and the murderer shall be put to death.' Thank-you." *Chambers* at 643.

11 *Marsh v. Chambers*, 463 U.S. 783, 792 (1984) quoting *Walz v. Tax Commission*, 397 U.S. 664, 678 (1970).

12 See Petition for Writ of Certiorari at 18 and 19.

13 Dr. Donald Lutz, *The Relative Influence of European Writers on Late 18th Century American Political Thought*, 78 AMERICAN POLITICAL SCIENCE REVIEW 189-197 (1984).

attributed to authors who themselves derived their ideas from the Bible. Thus 94% of the quotes of the Founding Fathers came either directly or indirectly from the Bible.

It is clear from their writings and speeches that they believed morality to most appropriately come from the Bible. Gouverneur Morris stated:

> Religion is the only solid basis of good morals; therefore education should teach the precepts of religion, and the duties of man toward God.[14]

In his Farewell Address, George Washington further affirmed the inseparability of morality and Biblical principles.

> Reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.... Who that is a sincere friend to it can look with indifference upon attempts to shake the foundation of the fabric?[15]

Thus the Framers did not revere and respect the Bible simply because they believed it to be a text of one religion with certain good attributes. Rather, their admiration went much further—they saw the Bible as the very foundation of all morality.

Early Rulings by This Court

This perspective of the proper role and use of the Bible was continued by the Supreme Court in their early rulings. In fact, an 1844 case found that the teaching of morality was inseparable from the teaching of the Bible. The case involved a $7 million estate which was bequeathed to the

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14 GOUVERNEUR MORRIS, NOTES ON THE FORM OF A CONSTITUTION FOR FRANCE (uncertain date).

15 George Washington, Farewell Address (September 17, 1796), *in* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, Vol. 1, p. 220.

city of Philadelphia for the purpose of establishing an orphanage. However, the deceased made the following stipulation:

> I enjoin and require that no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises.... My desire is, that all the instructors and teachers in the college shall take pains to instill into the minds of the scholars the purest principles of morality. [16]

Thus the question before the Court was whether both of these objectives could simultaneously be accomplished. Attorneys for both parties agreed that the clause prohibiting the teaching of Christianity was "anti-christian, and therefore repugnant to the law. [17] The attorneys for the City of Philadelphia stated

> The purest principles of morality are to be taught. Where are they found? Whoever searches for them must go to the source from which a Christian man derives his faith—the Bible....There is an obligation to teach what the Bible alone can teach, viz. a pure system of morality. [18]

Justice Story, writing for a unanimous Court, agreed that while clergy could be excluded, the teaching of the Bible by laymen must continue if morality was to be taught.

> Why may not a layman instruct in the general principles of Christianity as well as ecclesiastics? . . . And we cannot overlook the blessings, which such [lay]men by their conduct, as well as their instruction, may, nay must impart to their youthful pupils. Why

16 *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127, 132 (1844).

17 *Id.* at 143.

18 *Id.* at 153, 171.

> may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the [school]—its general precepts expounded, its evidence explained and its glorious principles of morality inculcated?... Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament? [19]

Current Rulings by This Court

Rulings by this Court which affirm the importance of the Bible are not limited to the 19th Century. Just last term, Chief Justice Rehnquist quoted the Bible in favor of upholding a death penalty conviction.

> The principles which have guided criminal sentencing—as opposed to criminal liability—have varied with the times. The book of Exodus prescribes the *Lex talonis*, "An eye for an eye, a tooth for a tooth." *Exodus 21:22-23*.[20]

Under the present case law established by the Pennsylvania Supreme Court, if a prosecutor were to read this excerpt of this Court's decision, he would risk not only a retrial but also subjection to disciplinary action. Thus, the Pennsylvania Supreme Court has alienated the courts in that state, not only from any Biblical reference, but also from the decisions of this Court by undermining the authority and reputation of this Court.

Present Customs By This Court and Other Courts

While courts below are creating per se bans on Biblical references and covering displays of the Ten Commandments from view of the jury to ensure the fair trial rights of defendants, [21] they must not ignore the fact that this Court

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19 *Id.* at 200.

20 *Payne v. Tennessee*, 115 L.Ed. 2d 720, 731 (1991).

21 *See* Argument III.

has for years displayed the Ten Commandments in an appropriate place of prominence—directly above the chair of the Chief Justice.

Those who tour the Supreme Court building are told that the display represents the sources from which American law has been derived. Those who attend oral arguments hear the traditional cry of the Clerk, "God save the United States and this honorable Court." Chief Justice Rehnquist has further affirmed the significance of the Ten Commandments by stating:

> It is . . . undeniable . . . that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World. [22]

Ironically the Pennsylvania Supreme Court also has a very large mural of Moses carving out the Ten Commandments and a display of the Decalogue itself hanging directly behind the bench. [23] All attorneys arguing before the Pennsylvania Supreme Court must view the displays and are reminded of the importance that the Ten Commandments have had in our nation's legal system.

Other displays, including a rendition of Christ's Beatitudes and a quote of William Blackstone affirming the great importance of Divine law, adorn the walls of the courtroom.

Numerous Other Evidences Which Proclaim Our Nation's Foundation

Our public buildings offer more evidence of the Biblical foundation of America. In the House and Senate chambers appear the words "In God We Trust"; in the capitol rotunda is the figure of the crucified Christ; carvings on the capitol dome testify to "The New Testament according to our Lord and Saviour Jesus Christ."

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22 *Stone v. Graham*, 499 U.S. 39, 45 (1980) (Rehnquist, J., dissenting).

23 See Appendix at 1a-2a.

The Great Seal of the United States proclaims *Annuit Coeptis*, which means "God has smiled on our undertaking." Under the seal is inscribed the phrase from Lincoln's Gettysburg Address, "This nation under God." The walls of the Library of Congress are adorned with the words of Psalm 19:1 and Micah 6:8; engraved on the metal cap of the Washington Monument are the words, "Praise be to God." Lining the stairwell of the Monument are numerous Scripture verses that apply the Christian faith to every sphere of life from the family to business, and from personal character to government.

In spite of these irrefutable evidences of respect for the Bible, the Pennsylvania Supreme Court has stated,

> We now admonish all prosecutors that reliance upon the Bible or any other religious writing in support of the imposition of a penalty of death is reversible error per se and may subject violators to disciplinary action. [24]

In order for the philosophy of the Pennsylvania Supreme Court to prevail, each of these displays of legitimate moral law must be removed.

III.

This Court Should Accept this Case for Review for the Purpose of Putting an End to Even More Blatant Actions by Other Courts Which Undermine the Authority of All Courts.

Other courts across the country have made even more blatant errors in attempting to shield jurors from considering the moral aspects of the death penalty. In DeFuniak Springs, Florida, prosecutor Clayton Adkinson represents the State of

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24 *Chambers* at 644.

Florida in the case *State of Florida v. Broxson.* [25] In that case, Defendant George Broxson is facing charges for allegedly beating his minor daughter to death. On March 19, 1992, Defendant Broxson's counsel, Robert T. Adams, filed a Written Objection with the Court.

That objection stated in pertinent part, the following:

> That in the past, the undersigned attorney has personally observed the fact that in the doorway leading to the Courtroom in Walton County, Florida, there is a large plaquered [sic] reciting [sic] the Ten Commandments, with portions of them in red letters.
>
> That the prospective jurors and all other folk entering the Courtroom are faced with that material upon entry into the Courthouse.
>
> That the recitation [sic] of the plaquered [sic] is depriving some individuals of their "freedom of conscience" and the protection of the State and Federal Constitutions.
>
> That the plaquered [sic] may be offensive to prospective jurors as well as other personnel.
>
> WHEREFORE, the defendant files this Written Objection to the plaquered [sic] reciting [sic] the Ten Commandments in the Courthouse, in a position where all prospective jurors and other personnel of necessity are confronted with them.

Both Attorney Adams and Attorney Clayton appeared before Judge Laura Melvin on this Objection. Judge Melvin subsequently entered the following order:

> By this objection, the Defendant raises a novel issue that squarely throws the Defendant's right to be free

25 *State of Florida v. Broxson*, 90-293-CF.

> of any religious pressure imposed by the State, into direct conflict with the Jewish and Christian ethics and traditions relating to the Ten Commandments. However, in view of the State's response, there is no issue for the Court to determine and the Court simply confirms that the placard will be covered.
>
> The Court being otherwise fully advised in the premises, it is therefore
>
> ORDERED that the placard containing the Ten Commandments shall be covered in accord with the agreement of the State and Defendant.

Thus the trial will commence in the coming weeks with a new venue that is void of the Ten Commandments in an effort to prevent the text from "tainting" the jury. This scenario is one of many examples across the country in which judges have overstepped their bounds of proper discretion in an effort to protect the rights of defendants to a fair trial. In attempting to ensure fairness, courts have ignored the rights of free speech of prosecutors by creating a per se ban on all religious references and have violated the Establishment Clause by banning the display of the Ten Commandments. Even under the *Lemon* test's second prong, governmental action could not have the primary effect of inhibiting or discouraging religion.

Both the per se ban of the Pennsylvania Supreme Court and the order of Judge Melvin are overzealous actions of courts which refuse to respect the free speech rights of prosecutors and the right of the Jewish and Christian faiths to be free from governmental intrusion. In both of these cases and in numerous cases across the nation, there is a great need for clarification on the proper role and discretion that judges are given and when their discretion violates other constitutional protections.

For that court to state that any Biblical reference in favor of the imposition of the death penalty is per se reversible error and subjects violators to disciplinary action is to undermine its own authority and the authority of this Court. In effect, the Pennsylvania Supreme Court is stating that it may on a daily basis be exposed to numerous Biblical passages but that a jury which hears a seven-word passage is prejudiced. Such an inconsistency is intolerable, because it undermines the authority of this Court.

In *Marsh v. Chambers* [26] this Court held that legislative prayers were not violative of the Establishment Clause and made the distinction between prayers offered in a legislature and prayers which involved minors who were presumably susceptible to peer pressure.

> Here, the individual claiming injury by the practice is an adult, presumably not readily susceptible to "religious indoctrination." [27]

In *Stone v. Graham*, this Court distinguished minor children's exposure to prayer from adults involved in the legal process. A jury's exposure to the Ten Commandments or the recitation of a passage from the Bible is also distinguishable from *Stone v. Graham*. The reasoning of *Stone v. Graham* may be overturned by this Court's ruling in *Lee v. Weisman*, [28] which had not been handed down at the time this brief was written. The *Amicus* would point out that the actions of the trial judge and the ruling of the Pennsylvania Supreme Court have the primary effect of inhibiting religion and thus fail even under the *Lemon* test.

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26 *Marsh v. Chambers*, 463 U.S. 783 (1984).

27 *Marsh v. Chambers*, 463 U.S. 783, 792 (1984), citing *Tilton v. Richardson*, 403 U.S. 672, 686 (1971) and *Abington School District v. Schempp*, 374 U.S. 203, 290 (1963).

28 *Lee v. Weisman*, U.S. No. 90-1014 (argued Nov. 6, 1991) challenging the Court's tripartite Establishment Clause test created in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Jurors, who must be adult citizens, do not ignore the statute which they are commissioned to apply upon hearing a prosecutor quote the Bible or upon gazing at the Sixth Commandment before they walk into the courtroom. The Pennsylvania Death Penalty Statute is complemented, not contradicted, by the Bible.

Furthermore, it is most appropriate for jurors to be reminded of the important role that the Ten Commandments and the Bible in general have had in the shaping of our nation's laws.

> It does not seem reasonable to require the removal of a passive monument, involving no compulsion, because its accepted precepts, as a foundation for law reflect the religious nature of an ancient era.[29]

Both the Pennsylvania State Supreme Court and the trial judge in this case base their rulings on an interest of protecting the respective defendant's rights to a fair trial. However both the Pennsylvania Supreme Court and the trial judge in Florida have done exactly what this Court has repeatedly stated cannot be done.

This Court has held that bans on free speech, including prosecutorial comment, must have a governmental interest.[30]

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29 *Stone v. Graham*, 449 U.S. 39, 45 (1980) (Rehnquist, J., dissenting) citing *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 34 (1973).

30 *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity. *Carrol v. Princess Anne*, 393 U.S. 175 (1968); *Bantam Books Inc. v. Sullivan*, 372 U.S. 58 (1963); Respondent thus carries a heavy burden of showing justification for the imposition of such a restraint.") *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) quoting *Procunier v. Martinez* 416 U.S. 396, 413 (1974) ("The limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interests involved.")

If it cannot be proven that the ban has the governmental interest to protect the fair trial rights of the defendant, but goes beyond that point, it is a violation of the First Amendment rights of the prosecutor. [31] The *Amicus* firmly believes that the contested statements of the prosecutor in Pennsylvania and the posting of the Ten Commandments in Florida do not prejudice the jury and are thus not based on a cognizable compelling state interest.

CONCLUSION

For the above-stated reasons, the *Amicus* respectfully asks this Court to accept this case for review and reverse the decision of the Pennsylvania Supreme Court.

Respectfully Submitted,

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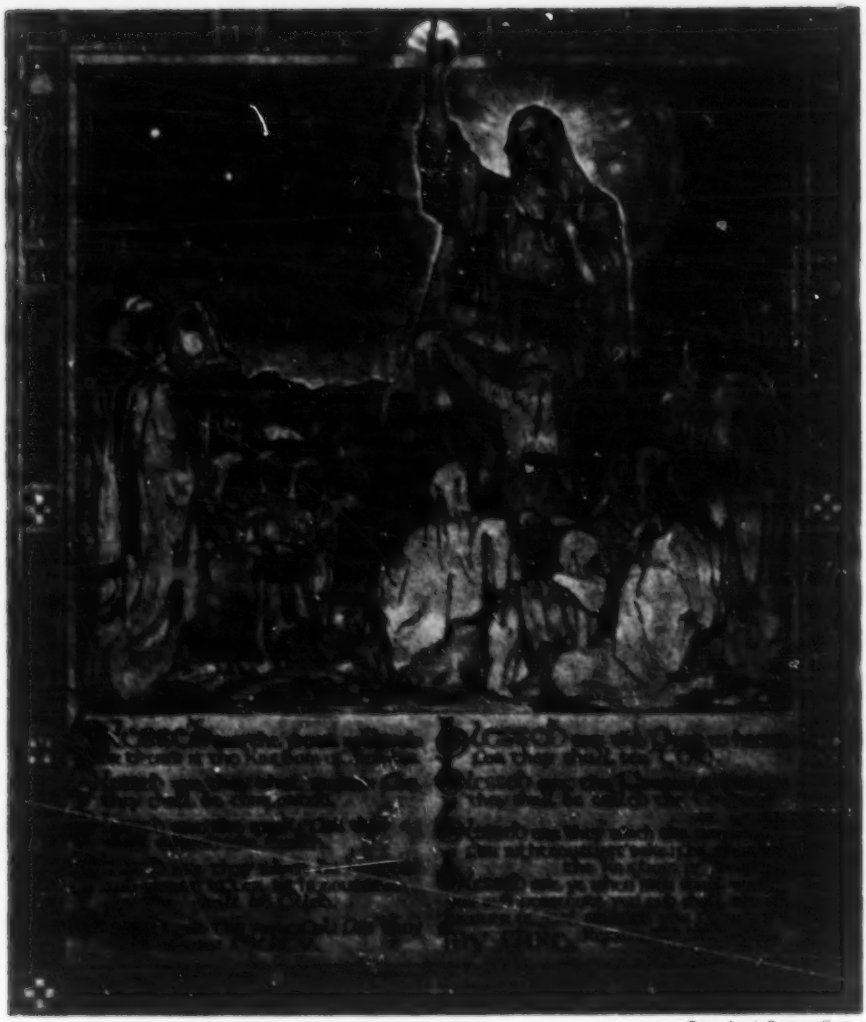
Date: May 4, 1992

31 *Gentile v. State Bar of Nevada*, 501 U.S. ___, 115 L.Ed. 2d 888 (1991).

APPENDIX

These two murals appear on the walls of the interior of the Pennsylvania Supreme Court.

Pennsylvania Supreme Court



Pennsylvania Supreme Court